Petition

81-1252

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HARRY C. BOGGS, *Petitioner*,

v.

E. DANDRIDGE MCDONALD,
N. PAUL BROMLEY, OTIS DOYLE CASTO,
MEMBERS OF AND CONSTITUTING THE
PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

1. Whether the Court of Appeals erred when finding that the petitioner, a small independent oil and gas producer, was subject to the jurisdiction of the West Virginia Public Service Commission and not the Federal Energy Regulatory Commission?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

No.

HARRY C. BOGGS, Petitioner
v.
E. DANDRIDGE McDONALD, N. PAUL BROMLEY, OTIS DOYLE CASTO, MEMBERS OF AND CONSTITUTING THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Harry C. Boggs, prays that a writ of certiorari issue to review the judgment of the United States District Court for the Fourth Circuit, affirming the Order of the United States District Court for the Southern District of West Virginia.

OPINIONS BELOW

The opinion of the Court of Appeals was to have been published but its status was changed to unpublished. It appears in the Appendix, (App. 1),[1] to this petition. The opinion of the District Court is unreported and appears in the Appendix, (App. 8), to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on October 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] The reference, "App." refers to the appendix accompanying this petition.

STATUTORY PROVISIONS INVOLVED

This petition concerns an interpretation of Section 1 of the Natural Gas Act, codified at 15 U.S.C. § 717 which provides:

> (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.
>
> (b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local

distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power of jurisdiction.

STATEMENT OF THE CASE

The petitioner sought injunctive relief from the United States District Court for the Southern District of West Virginia to preclude the West Virginia Public Service Commission (PSC) from exercising jurisdiction over his gas production, transmission and sales activities.

The petitioner, Harry C. Boggs, owns a fully integrated system of producing gas wells situate in Roane County, West Virginia. The natural gas produced by these wells is sold at the terminus of petitioner's gathering lines where it is comingled with natural gas originating in states other than West Virginia and is transported by interstate pipeline companies for sale to residents of Virginia, Pennsylvania, Maryland, New York

and the District of Columbia. (JA. 45-47)[2] In 1964, Boggs entered into a contract with United Fuel Gas Company for the sale of natural gas. (JA. 133-51) That agreement was for an indefinite term and the gas supplied thereunder was transported to states other than West Virginia for consumption.[3] The petitioner has entered into subsequent contracts with Columbia Gas Transmission Company (a successor to United Fuel) for sales of gas to customers in interstate commerce. From 1976 to 1979, Boggs also sold gas by contract to Columbia Gas of West Virginia, a resale for intrastate use, which gas was

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[2]The reference "JA" refers to the joint Appendix filed with the Court of Appeals.

[3]Both the district court and the fourth circuit ignore this sales agreement in their opinion. Both courts refer only to the 1976 contract with Columbia Gas Transmission but do not address the 1964 contract with United Fuel.

the only gas which was reserved in Boggs' interstate contracts. When the Columbia Gas of West Virginia contract expired in 1979, this exception obviously expired.

At the time of the 1964 contract with United Fuel, Boggs sold gas to Spencer Gas Company for resale to residential customers along the various gathering lines which transport the natural gas from the petitioner's wells to the interstate pipelines.

In 1970, following numerous disputes between the petitioner and the PSC the West Virginia Supreme Court ruled that the petitioner was a public utility under the law of West Virginia and was thus subject to control by the PSC. Boggs v. Public Service Comm., 154 W.Va. 146, 174 S.E.2d 331 (1970). (JA. 22-28) Following this, by letter dated August 25, 1970, Spencer

Gas Company cancelled its contract with petitioner and stated that it would only continue to receive gas from the petitioner as ordered by the PSC (JA. 130) Petitioner is continuing to supply natural gas to Spencer Gas Company solely under compulsion of the PSC. (JA. 20-21, 29-30) The domination of the PSC over the petitioner has progressed to the degree that the PSC has ordered the petitioner to supply new customers of Spencer Gas Company with gas after Spencer cancelled the contract with the petitioner. At times the controversy has reached the point where the PSC threatened the petitioner with imprisonment if such new service was not provided. (JA. 31-32)

By virtue of these forced sales to Spencer Gas Company for resale, at times during the winter months little of petitioner's gas reaches the interstate

pipeline; the majority of his production is consumed by the various customers of Spencer Gas receiving gas from petitioner's gathering lines.

In 1979, petitioner sought injunctive relief from the United States District Court for the Southern District of West Virginia to prevent the PSC from compelling him to comply with its mandates to furnish additional gas from his gathering lines to new customers of Spencer Gas, thereby reducing the interstate flow. The PSC had threatened the petitioner with, among other things, imprisonment. Through these protracted disputes the petitioner has continually asserted that the agency which should have jurisdiction over his production and sales activities was the Federal Energy Regulating Commission (FERC) and not the PSC. The relief requested was denied by

the district court and the fourth circuit court affirmed.

In denying the relief sought, the district court found that petitioner's "natural gas operation is not a fully integrated system by which natural gas from wells owned by Boggs is produced and transported directly into interstate commerce so as to bring him within the exclusive jurisdiction of the Federal Energy Regulatory Commission" and that "Boggs' natural gas operation, with respect to his selling natural gas to Consumers Gas Company is purely intrastate in character." (JA. 184-85) This was affirmed by the fourth circuit.

REASONS FOR GRANTING THE WRIT

The fourth circuit and the district court opinions are contrary to the great

weight of authority of other circuits in holding that petitioner is not subject to the jurisdiction of the Federal Energy Regulatory Commission. Those opinions also are in direct conflict with decisions of this Court. They are also inherently flawed as they fail to consider the facts surrounding Boggs' operation.

Initially, the district court and the fourth circuit erred in finding that petitioner's system of wells was not fully integrated. As the map accompanying this petition (App. 26) clearly illustrates, all of the petitioner's production flows into a series of interconnected gathering lines for ultimate sale into interstate commerce at various points along those lines. For the district court to hold, and for the fourth circuit to approve, the holding that the petitioner's system of lines is not integrated is a clear mistake

of fact which by itself should require a reversal of the holding of the fourth circuit. This is especially true since the fifth circuit has ruled that if gas from an integrated system is sold in interstate commerce, all of the gas in that system is subject to control by the federal agency and not the state agency. Louisiana Public Service Commission v. Federal Power Commission, 359 F.2d 525 (5th Cir., 1966).

Moreover, it has been repeatedly held that sales of natural gas for resale are in interstate commerce if at any time any of the gas crosses a state line at any point from the wellhead to the point of ultimate consumption. California v Lo Vaca Gathering Co., 379 U.S. 336 (1965); Louisiana Power and Light v. United Gas Pipe Line Co., 456 F.2d. 326 (1972). The purpose of this broad federal jurisdiction

is to assure an adequate supply of natural gas for all citizens of the nation and to preclude the residents of one state or area from having an abundance of gas while individuals living in other areas are without natural gas. Federal Power Commission v. Louisiana Power & Light, 406 U.S. 621 (1972); United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392 (1965).

The necessity of and benefits accruing to the nation from a broad system of federal control of the supply of natural gas can be seen in this Court's holdings that exceptions to the grant of federal jurisdiction are to be strictly construed. Interstate Natural Gas Company v. Federal Power Commission, 331 U.S. 682 (1947). The doctrine of strict construction has been applied so consistently by this court in cases involving a dispute over state as

opposed to federal control that it has been ruled that gas produced in numerous states for sale in one state was interstate gas. Federal Power Commission v. East Ohio Gas Company, 338 U.S. 464 (1950), (this decision was overruled by the passage of section 1(c) of the Natural Gas Act 15 717 § 717(c)). Thus, this court has been unwilling to find exceptions to Congress' clear delegation of jurisdiction to the federal agency.

In the affirming the district court, the fourth circuit found the PSC "was not precluded from regulating the local production, gathering and distribution of natural gas" (App. 6), apparently viewing the activities of the PSC in compelling Boggs to furnish gas to Spencer Gas as falling within the "production and gathering" exception, of the Natural Gas Act. Permitting the PSC to exercise

jurisdiction over petitioner's activities by virtue of that exception is clearly an improper and unwarranted expansion of that exception, in violation of this court's rule of strict construction of exceptions to federal authority. The production and gathering exception has been consistently held to apply only to the "physical activities, facilities and properties used...in the production and gathering of natural gas." Deep South Oil Co. of Texas v. Federal Power Commission, 247 F.2d 882, 889 (5th Cir. 1957). See also, Phillips Petroleum Company v. Wisconsin, 347 U.S. 672 (1954) and Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U.S. 498 (1949). In this case it is clear that the PSC is regulating the petitioner's actual sale for resale of gas in interstate commerce as it is forcing him to provide gas to a company selling gas to

residential customers at various points between his wells and an interstate pipeline. Hence, the production and gathering exception is clearly inapplicable.

Furthermore, distinctions which may have at one time been in vogue concerning the point of sale of the gas as determentive of whether the sale was subject to state or federal regulation is no longer of concern as sales occurring both before and after gathering have been ruled to be in interstate commerce. Deep South Oil Co. v. Federal Power Commission, 247 F.2d 882 (5th Cir. 1957). ("[T]he fact that the sales are made at the wellhead [before gathering] is immaterial for the particular point at which the title and custody of the gas pass to the purchaser, without arresting its measurement to the ultimate interstate

destination, does not affect the essential interstate nature of the business." Id. at 887 and Interstate Natural Gas Company v. Federal Power Commission, 331 U.S. 682, (1947) (the fact that the gathering process had been completed at the point of sale did not remove the sales from control under the Natural Gas Act). Thus, this Court has been unwilling to adopt refined distinctions such as variations on the point of sale concerning the applicability of the Natural Gas Act, and has, instead, looked to the broader policies behind the Act. Phillips Petroleum Company v. Wisconsin, 347 U.S. 672 (1954). Thus, the fourth circuit's holding that petitioner's activities were local in nature, falling under the production and gathering exception is clearly inconsistent with opinions of this Court and with other circuits and, thus, should be set aside.

The error of the district court and the fourth circuit is even more stark when the decisions of two other cases are reviewed, both of which found jurisdiction in the Federal Energy Regulatory Commission.

In Saturn Oil & Gas Company v. Federal Power Commission, 250 F.2d 61 (10th Cir. 1957), cert. denied, 355 U.S. 956 (1956), the gas company was seeking to avoid jurisdiction of the Federal Power Commission by asserting that its sales, at the wellhead, prior to any gathering or co-mingling with any gas from any other source were exempt from federal control. There the gas company owned only the wells, and none of the gathering or transmission facilities past the "Christmas tree", and sold the gas to companies which transported it out of the state. The circuit court ruled that such

sales were subject to the jurisdiction of the Federal Power Commission and were not subject to state control.

Even more analagous to the situation involved in this case is the situation existing in Public Service Commission of Kentucky v. Federal Energy Regulating Commission, 610 F.2d 439 (6th Cir. 1979). That case involved a Kentucky statute which permitted individuals living within one-half mile of the wellhead or of a gathering line to demand natural gas service from the well or gathering line owner. There the Sixth circuit ruled that the Kentucky statute was invalid as the control of the gas in such lines was subject to control of the Federal Energy Regulatory Commission, noting "[t]he ultimate sale in other states of a substantial part of a producer's output invokes federal jurisdiction over the

entire volume of production. The natural gas here at issue begins its journey in interstate commerce at the wellhead." Id. at 444. In invalidating the statute the court said:

> The Kentucky law seeks to reserve a supply of natural gas to certain state residents. The statutory plan, independent of federal regulatory control, denies to consumers outside of Kentucky and to Kentuckians whose real estate lies beyond one-half mile of wellheads and gathering lines the equal access that they otherwise would enjoy to Kentucky natural gas. If pursued by many or all producing states in times of extraordinary scarcity, the Kentucky policy would impede, if not prohibit altogether, accomplishment of the congressional desire to provide an adequate supply of natural gas for the entire nation.

Id. at 443.

The language of the sixth circuit is equally applicable to this case. By the actions of the West Virginia Public Service Commission, those living along petitioner's gathering lines are given preference over thousands of citizens in

numerous states who are ultimately served by petitioner's wells. This preference is most marked in the winter months, when the petitioner is unable to furnish as much gas to his interstate customers as would otherwise be possible as a great portion of his production is garnered by those who receive gas from his gathering lines. This activity, prejudicial to the national supply of gas, clearly violates the purpose and spirit of the Natural Gas Act, violates the clear weight of authority and should not be permitted to continue.

Perhaps the most blatant error of the fourth circuit was its statement that "[t]he regulation adopted by the PSC is narrowly drawn and will have little, if any, adverse effect on interstate commerce in natural gas." (JA. 6-7) Thus, the fourth circuit intimates that a state may interfere with interstate sales of natural

gas as long as that interference is limited. This view is in clear conflict with the view of the tenth circuit. Backus v. Panhandle Eastern Pipe Lines Co., 558 F.2d. 1373 (10th Cir. 1977). In condemning a view similar to that of the fourth circuit set forth above, the court in Backus stated: "If the producer of gas can be required to serve a small area and a few people, we see no reason why he should not be required to serve a larger area and more people." Id. at 1375. Later the tenth circuit again stated: "The de minimus nature of the proposed new service cannot be controlling since one de minimus approval after another can accumulate to the point where there is a substantial effect on the other customers of the pipeline." Id. at 1376.

What the tenth circuit indicates could happen, if states are permitted to compel

service to a few individuals, has, in fact, occurred in this petitioner's case causing the interstate supply of gas to be reduced. This problem has been exacerbated as the petitioner has not only been required to sell Spencer Gas Company gas for resale, but, under threats of imprisonment, to furnish additional quantities of gas to Spencer Gas for resale to new customers of Spencer after being told by Spencer Gas that it did not want petitioner's natural gas. To permit such activities on the part of the state is a clear violation of the mandate of Congress that gas sold in interstate commerce be free from state interference.

The fourth circuit also erred in stating that the January and June, 1976 contracts with Columbia Gas Transmission Corporation and Columbia Gas of West Virginia required petitioner to first

supply Spencer Gas, at which point he would be free to sell any excess not required by Spencer Gas to Columbia Gas Transmission and Columbia Gas of West Virginia. (App. 3) This is not true. The June, 1976 contract is subject only to the January, 1976 contract with Columbia Gas of West Virginia and nothing else. The January, 1976 contract contains no restriction on the dedication of the supply of petitioner's natural gas. Furthermore, at the time the 1976 contracts were entered into, the petitioner had no contractual relationship with Spencer Gas, as that relationship was terminated by Spencer Gas's letter of August 25, 1970. (JA. 130) Moreover, the fourth circuit failed to address the 1964 contract between petitioner and United Fuel, implying that the previously discussed 1976 contracts were petitioner's

first sales to an interstate pipeline company. This is also not true and for the fourth circuit to base its opinion on these erroneous factual conclusions, renders its opinion totally invalid.

Finally, the fourth circuit cites as support for its mistaken view that the PSC and not the FERC has jurisdiction over the petitioner, the position of the Federal Energy Regulatory Commission in its amicus curiae brief that the federal commission has not opposed the states' exercise of jurisdiction. This court has repeatedly held that the jurisdiction of a federal regulatory agency may not turn on the degree of opposition to, or support for, the assertion of jurisdiction by one of the particular agencies involved. Phillips Petroleum Company v. Wisconsin, 347 U.S. 672 (1954); Interstate Natural Gas Company v. Federal Power Commission,

331 U.S. 682 (1947). It would be unconscionable to permit this petitioner's business activity to be regulated by the West Virginia Public Service Commission simply because the proper regulatory body, the Federal Energy Regulatory Commission, did not actively pursue its jurisdiction. This error standing alone should cause the fourth circuit holding to be reversed.

Thus, the district court and the fourth circuit have by their misapplication of the law and their failure to recognize essential facts converted a simple case into a complex one. The holding of this Court in California v. Lo Vaca Gathering Company, 379 U.S. 366, 369 (1965) that "the sale of gas which crosses a state line at any stage of its movement from wellhead to ultimate consumption [is] in interstate commerce within the meaning of the Act"

(emphasis added). This statement, standing alone, applied to the facts of this case, requires that the Court set aside the holding of the court below.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH R. GOODWIN
RICHARD E. ROWE
ROBERT Q. SAYRE, JR.

Attorneys for Petitioner,
Harry C. Boggs

December 23, 1981

CERTIFICATE OF SERVICE

I, Richard E. Rowe, counsel for the petitioner, do hereby certify that Byron S. Adams Printing Company as agent for me, did on the 4TH day of January, 1982, mail a true and exact copy of the within Petition and Appendix to Robert Rodecker, Counsel for the Public Service Commission, State Capitol Building, Room E-214, Charleston, West Virginia, 25305.

Richard E. Rowe

RICHARD E. ROWE

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1098

Harry C. Boggs,

Appellant,

v.

E. Dandridge McDonald, N. Paul Bromley, Otis Doyle Casto, Members of and constituting the Public Service Commission of West Virginia,

Appellees.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Dennis R. Knapp, Judge.

Argued: June 2, 1981
Decided: October 6, 1981

Before BRYAN, Senior Circuit Judge, PHILLIPS and MURNAGHAN, Circuit Judges.

Joseph R. Goodwin (Richard E. Rowe, Goodwin & Goodwin on brief) for Appellant; Robert R. Rodecker (Richard E. Hitt, West Virginia Public Service Commission on brief) for Appellees.

Status change - Published to unpublished

PER CURIAM:

Appellant Harry C. Boggs (Boggs) is an independent producer of natural gas in West Virginia. He sued for a permanent injunction under the provisions of the Natural Gas Act, 15 U.S.C. § 717, et seq., and the Commerce Clause, U.S. Const. Art. 1, § 8. The District Court denied injunctive relief. We affirm.

In 1970 the West Virginia Supreme Court of Appeals affirmed a decision of the Public Service Commission of West Virginia (PSC) holding that Boggs was a public utility over which the PSC had jurisdiction.[1] The PSC exercised that jurisdiction in March, 1976 when it ordered Boggs to "provide natural gas to Spencer Gas Company, a corporation, for

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[1] Boggs v. Public Service Commission, 154 W.Va. 146, 174 S.E.2d 331 (1970).

resale to its rural customers, including all applicants for new service."[2] The injunction Boggs sought would bar enforcement of this regulation.

Boggs and his predecessors in interest have for many years supplied Consumers Gas Company, formerly Spencer Gas Company, with natural gas for resale to their rural customers. In January and June 1976 Boggs entered into contracts with Columbia Gas of West Virginia and Columbia Gas Transmission Corporation (Columbia Transmission). Under the terms of the contracts Boggs was to deliver any gas not required by Consumers Gas Company to Columbia Transmission. The gas would then enter lines owned by Columbia Transmission and eventually be sold out of State.

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[2]PSC Order of Mar. 8, 1976 at Appx. 180.

Boggs contended at trial that his business activities are conducted solely in interstate commerce and that under the provisions of the Natural Gas Act the Federal Energy Regulations Commission (FERC) has exclusive jurisdiction over those activities. After hearing the evidence the District Court held that:

1) The FERC did not have exclusive jurisdiction over all of Boggs' business activities;

2) Boggs was a public utility of West Virginia and therefore its intrastate activities were under the jurisdiction of the PSC;

3) Boggs was not entitled to any relief as prayed for in the complaint.

We disagree with the District Court only insofar as it suggests that the test for whether a natural gas operation may be regulated by a State is if the activity is

purely intrastate in character. No State may interfere with the Federal regulation of the interstate wholesale of natural gas.[3] This interference could be indirectly imposed, that is, through the regulation of purely intrastate activity. But while a State cannot interfere with the Federal regulatory scheme it is not totally precluded from regulating a company engaged in the interstate wholesale of natural gas.

If the activity to be regulated is not specifically exempted by the Natural Gas Act from all State control, the court should look to the nature of the regulation involved, the objective of the State and the effect upon the national interest in a comprehensive regulatory

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[3]Federal Power Commission v. East Ohio Gas Co., 338 U.S. 464, 473 (1950).

scheme.[4] In the instant case the State of West Virginia was not precluded from regulating the local production, gathering and distribution of natural gas. The regulation requires a State public utility to maintain and possibly provide additional natural gas to Consumers Gas Company for distribution to rural consumers.[5]

The objective of the regulation is to ensure that rural customers are provided with supplies of natural gas. This is a matter of great and primarily local concern. The regulation adopted by the PSC is narrowly drawn and will have little, if any, adverse effect on

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[4] See Illinois Gas Co., v. Central Illinois Public Service Co., et al., 314 U.S. 498, 505 (1942).

[5] The regulation did not specify the source from which Boggs was to supply the gas.

interstate commerce in natural gas. The natural Gas Act does not purport to regulate matters of such local concern, nor is there any national interest in a comprehensive regulatory scheme which outweighs West Virginia's interest in providing rural customers with natural gas.[6]

We agree with the District Court that Boggs was a public utility of the State and that part of his activities were intrastate in nature and not under the exclusive jurisdiction of the FERC.

Affirmed.

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[6]The non-interference with interstate objectives is demonstrated further by the FERC's support for the position of the West Virginia PSC. See Amicus Curiae Brief of FERC, Boggs v. McDonald, No. 79-2005 (December 23, 1980 S.D. W.Va.).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

HARRY C. BOGGS,

Plaintiff,

Vs. Civil Action No. 79-2005-CH

E. DANDRIDGE McDONALD, N. PAUL BROMLEY and OTIS DOYLE CASTO, Members of and constituting the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Defendants.

MEMORANDUM OPINION AND ORDER

Petitioner, Harry C. Boggs (Boggs), an independent producer of natural gas in the counties of Roane, Calhoun and Braxton, West Virginia, instituted this action under the provisions of 15 U.S.C. § 717(u) of the Natural Gas Act, 15 U.S.C. § 717, et seq., and the Commerce Clause of the United States Constitution, Article 1,

Section 8, seeking preliminary and permanent injunctive relief against respondents, members of the Public Service Commission of the State of West Virginia (PSC) from exercising any jurisdiction by that agency over Boggs' business. Boggs contends that pursuant to the provisions of the Natural Gas Act, the Federal Energy Regulatory Commission (FERC) has exclusive jurisdiction over all of his business activities in the production, gathering, distribution and sale of natural gas, which he further contends are conducted solely in interstate commerce.

After a hearing on Boggs' application for preliminary relief, at which testimony was taken, this court by memorandum opinion and order dated August 15, 1979, denied Boggs' request for a preliminary injunction to enjoin the PSC from exercising jurisdiction over his sale of

natural gas.[7] Boggs thereafter appealed that order to the United States Court of Appeals for the Fourth Circuit, which on May 22, 1980, in an unreported decision, affirmed this court's order with respect to the denial of the preliminary injunction.

Now before the Court is Boggs' application for permanent relief, which necessarily requires this court to make a decision upon the ultimate merits of the issues presented herein.

FINDINGS OF FACT

The facts germane to the issue in

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[7] H. L. Snyder, Columbia Gas Transmission Corporation, filed a brief, amicus curiae, urging issuance of the injunction. Howard E. Shapiro and Joshua Rokach, Federal Energy Regulatory Commission, filed a brief, amicus curiae, urging denial of the injunction and dismissal of the action.

this case are not in serious dispute and may be summarized as follows:

On April 1, 1964, Boggs purchased a production-gathering pipeline system from Commonwealth Gas Corporation (Commonwealth). In the April 1, 1964 deed and assignment from Commonwealth, Boggs agreed to honor all covenants and agreements inuring to the benefit of Spencer Gas Company (Spencer Gas) contained in a deed and assignment in 1935 from Commonwealth's predecessor in interest, Ohio Valley Gas Company (Ohio Valley).

In that 1935 deed and assignment, Ohio Valley agreed to supply Spencer Gas with natural gas for use by Spencer Gas' rural customers along Ohio Valley's gathering line. Since April, 1964, Boggs has been selling natural gas to Spencer Gas and its successor in interest,

Consumers Gas Company (Consumers). At the present time, Boggs serves some 150 customers of Consumers over approximately 43 miles of the original gathering and transmission lines purchased from Commonwealth. The natural gas flows from the wells leased or controlled by Boggs to his gathering lines, which serve as distribution lines for the flow of gas to Consumers' meters for the sale of gas to the individual rural customers. Each customer owns his own service line from the meter to his home.

On April 23, 1974, Boggs entered into an agreement with United Fuel Gas Company, as amended on June 15, 1974, whereby Boggs agreed to sell natural gas to United Fuel Gas Company, but the agreement specifically exempted from those gas sales natural gas which had been previously dedicated to Consumers' predecessor,

Spencer Gas Company.

On January 22, 1976, Boggs and Columbia Gas of West Virginia, Inc. (Columbia Gas), entered into a contract whereby Boggs agreed to sell to Columbia Gas all gas that he produced with the exception of that gas previously dedicated to Spencer Gas, as hereinbefore described.[8]

On June 29, 1976, Boggs and Columbia Gas Transmission Corporation (Columbia Gas Transmission) entered into a purchase and sale of gas agreement. That agreement dedicated "all of the natural gas that may be produced by [Boggs] from wells located on all lands in Braxton, Calhoun and Roane counties, West Virginia, now leased or controlled by [Boggs] for oil and gas

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[8]Respondent's Exhibit 1, Article I, Paragraph 2.

production purposes. . . ." However, that same agreement exempted from dedication gas destined to Consumers' rural customers.[9]

After whatever natural gas was needed to supply Consumers for its customers, the remaining natural gas travelled in a southerly direction where it entered Columbia Gas Transmission's compressor. It was at that point that the sale of Boggs' remaining natural gas occurred, which gas then entered into interstate commerce, through lines owned by Columbia Gas Transmission. None of the gas destined for the customers of Consumers passed through the compressor at the point of sale to Columbia Gas Transmission.

On March 8, 1976, the PSC issued the

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[9]Petitioner's Exhibit 8, Article 1, Paragraph 1.03 and Article 4, Paragraph 4.04.

following order:

> It is, therefore, ordered that Harry C. Boggs, doing business as Boggs Natural Gas Company, shall provide natural gas to Spencer Gas Company, a corporation, for resale to its rural customers, including all applicants for new service, located along his transmission lines, unless and until otherwise ordered by the Commission.[10]

The genesis of this order occurred some six years previous thereto as a result of the ruling of the West Virginia Supreme Court of Appeals in Boggs v. Public Service Commission, 154 W.Va. 146, 174, S.E.2d 331 (1970). In that case the Court, in affirming a decision of the PSC, ruled that Boggs was a public utility over which the PSC had jurisdiction.

Specifically, the Court affirmed the

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[10]The PSC denied Boggs' petition for rehearing on March 26, 1976. Thereafter on July 6, 1976, the Supreme Court of Appeals of West Virginia denied Boggs' application for an appeal.

PSC's Finding and Order entered October 1, 1969, which stated:

> "The defendant, Harry C. Boggs, should be required to continue gas service to the Spencer Gas Company under the same rates and conditions heretofore agreed on by the parties until further order of this Commission or of a Court having jurisdiction; and it is so ordered."

In its show cause order[11] entered on January 4, 1979, the PSC alleged that Boggs was not complying with the March 8, 1976, order requiring him to provide natural gas to Consumers for resale to its rural customers, including new customers. A show cause hearing was scheduled on February 1, 1979. This action followed to enjoin the PSC from exercising jurisdiction over Boggs' sale of natural gas on the stated grounds that the FERC has exclusive jurisdiction over all of

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[11] Petitioner's Exhibit No. 9

Boggs' activities in this matter. By agreement between the parties, as reflected by various orders of the court, the status quo ante litem has been preserved until the issued of this case are finally adjudicated.

This case represents yet another battle--but perhaps the last--in what seems to be never-ending war waged by the parties. However, here the battle lines are distinctly drawn; that is, if all or any part of Boggs' business is of a purely intrastate character, the PSC has jurisdiction over such portion of Boggs' natural gas business. On the other hand, if Boggs is transacting business of a purely interstate character, that business is regulated by the FERC[12] under the

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[12] Respondents readily concede, of course, that the FERC has jurisdiction over Boggs with respect to his contracts with Columbia Gas Transmission.

the provisions of the Natural Gas Act, supra.

In order to come within the purview of the Natural Gas Act, it is axiomatic that one should carry on a business which would satisfy the definition of "natural gas Company" under the Act. The Act, 15 U.S.C. 717(a), defined "natural gas Company" as ". . .a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

Further, the Act provides, 15 U.S.C. 717(b), that "[t]he provisions of this chapter shall apply to the transportation. . .[and] to the sale of natural gas in interstate commerce. . .but shall not apply. . .to the local distribution of natural gas."

Thus, the question in this case is

whether Boggs is carrying on the business of transportation of natural gas solely in interstate commerce or whether the facts show that his business sales are, at least in part, in intrastate commerce.

In order to qualify as a natural gas company, transportation from the producing well must be by a fully integrated system of pipelines which cross a state line into another state. Louisiana Public Service Commission v. FPC, 359 F.2d 525 (5th Cir.), cert. denied. 385 U.S. 833 (1966). In describing United Gas Pipeline Company's transportation system, the Court held:

> "It transports and sells gas both in interstate and intrastate commerce, but gas for both types of sales travels in a comingled stream in the pipelines. The main pipelines involved in this case are part of a fully integrated pipeline system by means of which United transports and sells gas from the states of Texas,

> Louisiana and Mississippi to industrial customers, pipelines and local distributors in those states and in Alabama and Florida. The question under consideration has no relation to United's purely intrastate pipeline facilities which are completely separate from its interstate system and over which the Commission has not asserted jurisdiction." Louisiana Public Service Commission v. FPC, 359 F.2d 525 at 527. (Emphasis supplied).

In the instant case, however, it is readily ascertainable that Boggs' system is not totally integrated but segregated; that is, there was one fully integrated or continuous system from the wellhead to the distribution of the gas at the meters owned by Consumers down to the compressor of Columbia Gas Transmission. At that point another system owned by Columbia Gas Transmission transported the gas from the compressor into interstate commerece.

Boggs submits that because part of the gas destined for Consumers is

comingled with gas that will eventually enter Columbia Gas Transmission's compressor for further transportation to another state, all the gas produced at the wellhead is considered to be gas sold in interstate commerce and thus falls within the regulatory jurisdiction of the FERC. California v. Lo-Vaca Co., 379 U.S. 366 (1965).

The "comingling" doctrine, as it were, simply stated, pronounces that if gas which is to be sold within the producing state and gas which is to be sold without the producing state are comingled, all of the gas so comingled will be deemed to be transported in interstate commerce. Id. However, "[t]he question of 'comingling' has no relation to. . .purely intrastate pipeline facilities which are completely separate from its interstate system. . . ."

Louisiana Public Service Commission v. FPC, supra, at 527.

Such is the situation in the instant case. The FERC in its amicus brief essentially takes this position but goes one step further to support is position that an injunction should not issue. It suggests that Boggs' claim that the PSC's order of March 8, 1976, creates an unconstitutional burden on Boggs' interstate activities by requiring him to provide gas to additional, as well as existing, customers of Consumers is premature. The FERC points out that the order complained of does not require Boggs to divert any interstate gas to Consumers' customers, but only requires him to provide gas from whatever source such gas could be acquired, even if Boggs would be required to find other available supplies with which to meet his obligation.

The Court is not unmindful that as a practical matter the March 8, 1976 order might well create a burden on Boggs. Nevertheless, this Court must agree with the position taken by the FERC. The Court in this proceeding, in view of the facts, holds that Boggs' activities in his business or producing and distributing gas are of a dual character--both intrastate and interstate. The intrastate portion of his business does not come within the purview of the Natural Gas Act and thereby is not subject to FERC regulation. The regulation of Boggs in his intrastate activities is within the jurisdiction of the PSC.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the subject matter of and the parties to this action. Article 1, Section 8, to the

Constitution of the United States, 15 U.S.C. § 717(u) and 28 U.S.C. § 1331.

2. As disclosed by the evidence, Boggs' natural gas operation is not a fully-integrated system by which natural gas from wells owned by Boggs is produced and transported directly into interstate commerce so as to bring him within the exclusive jurisdiction of the Federal Energy Regulatory Commission and the provisions of 15 U.S.C. § 717, et seq.

3. Boggs' natural gas operation, with respect to his selling natural gas to Consumers Gas Company, is purely intrastate in character.

4. Boggs is a public utility of the State of West Virginia over which the PSC has jurisdiction insofar as the intrastate character of Boggs' operation is concerned. Boggs v. Public Service Commission, 154 W.Va. 146, 174 S.E.2d 331

(1970).

5. The Federal Energy Regulatory Commission does not have exclusive jurisdiction over Boggs' natural gas operations.

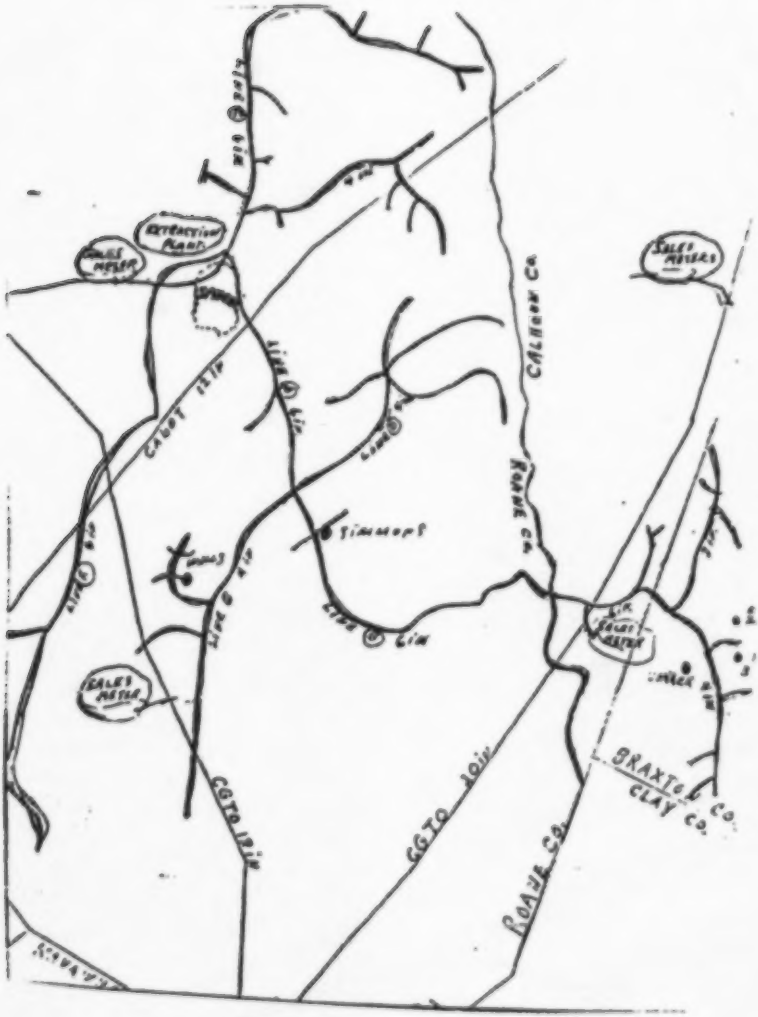
6. Boggs is not entitled to any relief as prayed for in his complaint.

O R D E R

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that judgment be entered in favor of the respondents.

ENTERED: December 23, 1980

/s/ DENNIS R. KNAPP
Chief Judge



PETITIONER'S GAS WELLS
AND SYSTEM OF GATHERING LINES

Opposition

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No. 81-1252

IN THE

Supreme Court of The United States

OCTOBER TERM, 1981

HARRY C. BOGGS, *Petitioner*,

v.

E. DANDRIDGE McDONALD,
N. PAUL BROMLEY, OTIS DOYLE CASTO,
MEMBERS OF AND CONSTITUTING THE
PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA, *Respondent*

BRIEF IN OPPOSITION TO PETITION OF HARRY C. BOGGS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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THE QUALITY PRESS, CHARLESTON, W. VA.

QUESTION PRESENTED

I. WHETHER THE SALES OF NATURAL GAS BY PETITIONER TO CONSUMERS GAS COMPANY ARE SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE FEDERAL ENERGY REGULATORY COMMISSION.

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STATUTORY PROVISIONS INVOLVED

This case involves an interpretation of §1(b) of the Natural Gas Act, 15 U.S.C. §717(b), which states:

> The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

STATEMENT OF THE CASE

The dispute over the jurisdiction of the Respondent, Public Service Commission of West Virginia, to regulate the public utility responsibilities of the Petitioner, Harry C. Boggs, has been waged in the Courts of the State of West Virginia and the United States for approximately fifteen years. Briefly stated, Petitioner contends that because he is a small producer of natural gas and sells gas to an interstate pipeline, he is subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission. Respondent, however, contends that the Federal jurisdiction over Petitioner is concurrent with the exercise of State jurisdiction over Petitioner's responsibilities as a local distributor of gas and that said local distribution responsibility preexisted any Federally regulated activity.

Because of the unusual factual situation which has given rise to the Petitioner's utility obligations, it is helpful to review the historical basis for the 1970 finding by the Supreme Court of Appeals of West Virginia that Petitioner is a utility and subject to the jurisdiction of the Respondent. [*Boggs v. Public Service Commission*, 154 W. Va. 146, 174 S.E. 2d 331 (1970)] It was that finding which has led to the decision of the United States District Court for the Southern District of West Virginia and the United States Court of Appeals for the Fourth Circuit in the instant action.

Prior to 1935, the gathering and distribution lines which presently serve the City of Spencer, Roane County, West Virginia, and the rural customers of Consumers Gas Company, Spencer Division, (hereinafter referred to as "Consumers") were all part of one West Virginia public utility system owned by the Ohio Valley Gas Company. In 1935 the Ohio Valley Gas Company, with the approval of the Public Service Commission of West Virginia, transferred the gas distribution part of its system to Spencer Gas Company (now Consumers) subject to the contractual obligation that Ohio Valley would undertake, for itself and any successor(s) in interest, to furnish the natural gas supply of Spencer Gas and its successors (JA-22-28).[1] This transfer created, in fact, two public utility entities — Ohio Valley and

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[1] The reference "JA" refers to the Joint Appendix filed with the Court of Appeals.

Spencer Gas Companies. The gathering lines retained by Ohio Valley were necessarily used by Spencer as distribution lines for Spencer's rural customers, since these rural customers' service lines were directly attached to the gathering lines of Ohio Valley.

Some years later, Ohio Valley merged into Commonwealth Gas Corporation. Commonwealth continued to furnish natural gas to Spencer Gas and to rural customers along Commonwealth's production and gathering lines. Boggs acquired the Commonwealth production and gathering facilities, together with all the obligations attached thereto, by a deed and assignment from Commonwealth dated April 1, 1964 (JA-154-5).

Initially, Boggs, pursuant to the obligations which he assumed upon the purchase of the Commonwealth properties, served Spencer and Spencer's rural customers along the gathering lines. (JA-89-91) In 1969, a dispute arose between Spencer and Boggs over the price Boggs would receive for supplying gas to Spencer and to Spencer's approximately 150 rural customers. (JA-82) Spencer filed a complaint before the Commission seeking relief against Boggs. The Commission held that Boggs was a public utility subject to the regulation of the Commission and established a rate Boggs could charge Spencer Gas for directly serving Spencer's rural customers. In 1970, the West Virginia Supreme Court of Appeals affirmed the Commission order and ruled that, under state law, Boggs was a West Virginia public utility.[a] Among other things, this decision meant that without Com-

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[a] The Court stated:

> Having found that Ohio Valley was not divested of its status as a public utility in the 1935 proceeding, placing Boggs, a successor in title, in the same position, we find that the decision in *Preston County Light and Power Company v. Renick*, 145 W. Va. 115, 113 S.E.2d 378, is controlling in the instant case. In *Preston County* the Court held that when facilities of a public utility have been devoted to the public service over a long period of time, such utility cannot cease to operate as such unless it applies for and receives from the Public Service Commission permission to terminate its public utility status.
>
> * * *
>
> In the instant case the transmission line, formerly owned by Ohio Valley and since 1964 by Boggs, has served the rural consumers in Roane and Calhoun Counties continuously since 1935 and prior thereto. This constitutes a dedication or devotion of that line to the public service and, in accordance with the principles set out in *Preston County*, supra, that facility will continue to be so dedicated and Boggs will continue to operate as a public utility unless he obtains from the Public Service Commission permission to terminate his status as such. We are in agreement with the Commission's finding that Ohio Valley was not divested of its public utility status in the 1935 proceeding. 174 S.E.2d 331 at 336, 337.

mission approval, Boggs could not abandon his obligation to serve the rural customers along the gathering lines who had been served by Boggs and his predecessor since before 1935 and that he had an obligation to provide adequate service to existing customers and to serve new customers. Boggs never sought a review of that decision by this Court.

Since the 1970 decision of the West Virginia Supreme Court of Appeals, Boggs has continued to resist state regulation, including a matter in which the Commission ordered him to serve new customers along the gathering lines by its order of March 8, 1976. The Commission responded to Boggs' resistance to State regulation on January 4, 1979, in Commission Case No. 9685 by issuing an order requiring Boggs to show cause why he should not be held in contempt of its March 8, 1976 order.

Boggs, on January 9, 1979, to prevent the Commission from proceeding in Case No. 9685, filed a complaint in this case for preliminary and permanent injunctive relief and a Motion for a Temporary Restraining Order against the Public Service Commission of West Virginia in the United States District Court for the Southern District of West Virginia. Petitioner sought to enjoin the Commission's exercise of jurisdiction over him as a public utility alleging exclusive jurisdiction with the Federal Energy Regulatory Commission pursuant to the Natural Gas Act and the Supremacy Clause of the United States Constitution.

At the request of the Court, the Federal Energy Regulatory Commission (hereinafter referred to as "FERC"), on April 16, 1979, filed an *amicus curiae* brief. In its Brief, the FERC recognized the existence of concurrent jurisdiction and urged dismissal of the proceeding.[3]

Following evidentiary hearings on April 26, 1979, August 15, 1979, and September 17, 1980, District Judge Dennis R. Knapp issued his December 23, 1980 Memorandum Opinion and Order denying injunctive relief.

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[3] A copy of the FERC Brief is attached hereto in the Appendix.

Upon appeal of the District Court's decision, the United States Court of Appeals for the Fourth Circuit issued its Opinion dated October 6, 1981. The basis for the decision of the Court of Appeals was clearly spelled out in the last sentence of the Opinion.

> We agree with the District Court that Boggs was a public utility of the State and that part of his activities were intrastate in nature and not under the exclusive jurisdiction of the FERC.

It is from that decision that Petitioner seeks the review of this Court by Certiorari.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Fourth Circuit, finding the existence of concurrent State and Federal regulatory jurisdiction, was a proper application of the law to a set of facts unique to the Petitioner.

ARGUMENT

In its Petition for a Writ of Certiorari, the Petitioner relies on two basic arguments in an effort to invoke this Court's review powers. First, it is contended that the decisions of the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Southern District of West Virginia are contrary to the great weight of authority and in conflict with decisions of this Court. Second, Petitioner contends that the Circuit Court of Appeals failed to consider the facts surrounding the operation of the Petitioner.

The Petition filed herein is based upon a fundamental misapprehension of the statute and case law applicable to this case. Simply stated, there is no conflict between the decision of the Court of Appeals and the decisions of this Court or other circuits. The cases relied upon by the Petitioner, both in its Petition herein and before the Courts below, are inapplicable to the case at bar. The Courts below have accurately perceived the facts surrounding Petitioner's operations. To adopt the position of the Petitioner would create a situation wherein any natural gas producer-utility could terminate its existing local utility responsibility by entering into a contract for the sale of all or any portion of its gas produced to an interstate pipeline. This result is contrary to the intent of Congress and would create havoc in the regulation of local distribution of natural gas by the States.

THE RELEVANT SECTION OF FEDERAL LAW APPLICABLE TO THIS CASE EXEMPTS THE LOCAL DISTRIBUTION OF NATURAL GAS FROM FEDERAL JURISDICTION

Section 1(b) of the Natural Gas Act provides in pertinent part that:

> The provisions of (the Natural Gas Act) . . . shall not apply . . . to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.[4]

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[4] 15 U.S.C. §717(b)

This clear statement of Congress establishes two distinct areas of natural gas activity which were excluded from Federal regulatory authority. Those two areas are: (1) the local distribution of natural gas and the facilities used for such distribution, and (2) the production or gathering of natural gas.

This case involves the "local distribution" exception. The following cases of this Court relied upon by Petitioner uniformly involve the "production and gathering" exception: *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682 (1947), *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949), *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), *United Gas Improvement Co., v. Continental Oil Co.*, 381 U.S. 392 (1965) and *California v. Lo-Vaca Gathering Co.*, 379 U.S. 336 (1965).

The following Circuit Court cases with which Petitioner contends the decision of the Fourth Circuit is in conflict also pertain to the "production and gathering" exception rather than the "local distribution" exception of Section 1(b): *Deep South Oil Co. of Texas v. Federal Power Commission*, 247 F.2d 882 (5th Cir. 1957), *Saturn Oil & Gas Company v. Federal Power Commission*, 250 F.2d 61 (10th Cir. 1957); *cert. denied*, 355 U.S. 956 (1956), *Backus v. Panhandle Eastern Pipe Line Co.*, 558 F.2d 1373 (10th Cir. 1977) and, *Public Service Commission of Kentucky v. Federal Energy Regulatory Commission*, 610 F.2d 439 (6th Cir. 1979).

A review of the remaining cases relied upon by Petitioner discloses that while they do not relate to the "production and gathering" exception of the Natural Gas Act, they are all distinguishable and do not involve producer-utilities such as Petitioner herein.

Federal Power Commission v. East Ohio Gas Company, 338 U.S. 464 (1950) involved a natural gas company operating solely within one state which purchased gas from interstate pipelines and resold the gas in Ohio. This Court found the company to be involved in the transportation of gas in interstate commerce and thus subject to Federal jurisdiction. Following that decision,

Congress acted to further define the limits of Federal jurisdiction by enacting Section 1(c) of the Natural Gas Act. (15 U.S.C. §717(c), amended 1954) Unlike East Ohio, Petitioner herein is not a transporter of natural gas nor has the Respondent ever suggested as much.

The remaining decision of this Court relied upon by Petitioner is *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). That case involved a claim by a direct sale customer of an interstate pipe line company that under Section 1(b) of the Act, it was not subject to Federal Power Commission authority regarding curtailments. This Court held that "the prohibition of the proviso of §1(b) withheld from the FPC only *rate-setting* authority with respect to direct sales." 406 U.S. 638 It was also found that curtailment regulations affected the *transportation* of natural gas and not rate-setting.

The case at bar does not involve a direct sale or transportation of natural gas in interstate commerce. What is involved is the question of the authority of the state regulatory agency to regulate a natural gas producer who is also a utility. Thus, on the facts, the *Louisiana Power & Light* case, *supra*, is distinguishable from this case.

The Fifth Circuit decision in *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 456 F.2d 326 (1972) relied upon by Petitioner[a] for the proposition that sales of gas for resale are in interstate commerce if at any time any of the gas crosses a state line at any point from the wellhead to the point of ultimate consumption, does not, in fact, support that position. The Fifth Circuit in that case found:

> . . . the channel of constant flow is an intrastate and not an interstate channel. The regulation of the Green system is substantially and essentially a localized matter committed to Louisiana's jurisdiction. 456 F.2d 340.

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[a] The decision at 456 F.2d 326 is discussed herein although the Table of Authorities in the Petition shows a citation of 456 F.2d 324. While the decision appearing at that page is one from the Fifth Circuit involving the same parties, it appears to be totally unrelated to any issue raised by Petitioner.

However, the decision of this Court at 406 U.S. 621, previously discussed, reversed the holding of the Fifth Circuit.[6]

There are several features that distinguish this case from the "Florida Parishes" case, *Louisiana Public Service Commission v. Federal Power Commission*, 359 F.2d 525 (5th Cir. 1966) also relied upon by Petitioner. That case also involved United Gas Pipe Line Company. In that case, the Court found that United operated a fully integrated pipeline system which transported gas both in interstate commerce and intrastate commerce through a commingled stream. Because of the commingling and the transportation in interstate commerce, the Court found the gas which remained in the Florida Parishes of Louisiana for distribution by a local utility was subject to Federal jurisdiction. The case did not involve a producer-utility such as the Petitioner. United Gas Pipe Line was not a local distributor of gas. The Florida Parishes case would be directly on point if the Respondent sought to regulate the sales of gas by an interstate pipeline, but that has not occurred.[7]

Thus, a review of the cases relied upon by Petitioner discloses that there is no conflict among the circuits and the decision of the Fourth Circuit is not contrary to any authority from this Court. Rather, the Fourth Circuit has properly found that concurrent jurisdiction exists in this case and such is wholly consistent with the Natural Gas Act.

This Court has repeatedly recognized that the Natural Gas Act of 1938 was not intended to create exclusive Federal jurisdiction but was to be complementary to that power reserved to the States. *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972). The purpose of Congress in enacting this legislation was to protect consumers against exploitation at the hands of natural gas companies. *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S.

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[6] For a more full discussion of the history of the jurisdictional dispute over the "Green System" of United Gas Pipe Line Company, see *Louisiana Power & Light Co. v. Federal Power Com'n*, 483 F.2d 623 (5th Cir. 1973)

[7] For example, Columbia Gas Transmission Corporation, like United in the Florida Parishes case and unlike the Petitioner, transports and sells gas in interstate commerce.

591 (1944); *Federal Power Commission v. Transcontinental Pipe Line Corp.*, 365 U.S. 1 (1961); *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137 (1960). And, in order to close the "attractive gap" of non-regulation which might otherwise exist, Congress enacted a dual State and Federal regulatory scheme. *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965); *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507 (1947); and *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). Here, it is clear, there is no "attractive gap," and the Respondent has the capacity to practically regulate the public utility responsibilities of Petitioner. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

THE COURT OF APPEALS ACCURATELY PERCEIVED THE FACTS RELEVANT TO THIS CASE

There is one unique aspect to this case which does cause some confusion. That is the fact that the Petitioner has only one customer; that being Consumers Gas Company.[a] This unusual situation arose when Ohio Valley Gas Company divided its operations and the Petitioner acquired the production part of the system. However, this situation has existed for the entire time Boggs has owned his production facilities and the facts surrounding his operation have not changed since the West Virginia Supreme Court of Appeals found Petitioner to be a public utility in 1970. *Boggs v. Public Service Commission*, 154 W. Va. 146, 174 S.E.2d 331.[b] Because Petitioner never sought review of the

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[a] There are, however, 150 residential customers of Consumers tapped directly into the gathering lines of Petitioner. (JA-82)

[b] In his Petition, Petitioner argues that his obligation to supply Consumers was terminated on August 25, 1970. However, at pages 96-97 of the Joint Appendix, the Petitioner admitted that subsequent to that date he asserted his contractual rights under contract with Spencer Gas (Consumers predecessor) in a suit which he initiated against the Respondent Public Service Commission. The following language from the case of *Louisiana Power & Light Co. v. Federal Power Commission*, 483 F.2d 623 (1973) seems especially appropriate here:

> We would point out that federal regulation is not to be considered a plaything to be turned on and off to suit a pipeline's financial advantage. We feel confident that the FPC would not allow itself to be so used and are certain that courts would not allow such a practice to continue. *Id.* at 632.

determination of utility status, Respondent believes that an analysis of this case must start with the understanding that notwithstanding the unusual aspect of his operation, Petitioner is in fact a public utility. It is not at all unusual, however, that a natural gas producer who sells gas in interstate commerce would also be a public utility subject to state jurisdiction.[10] To adopt Petitioner's position would serve to oust the Respondent from jurisdiction over not only the Petitioner but also over the other producer-utilities which presently are subject to state jurisdiction.

Petitioner argues that the Fourth Circuit erred in its evaluation of the facts concerning his "integrated system." It is sufficient to say that but for the self-serving statement of the Petitioner, there is no evidence in the record to show that he does in fact own an integrated system. Certainly, the gratuitous, unsponsored map which is included in the Appendix attached to the Petition herein, is so devoid of detail as to be of no support whatsoever.

Petitioner also argues that the Circuit Court erred in failing to find that sales in interstate commerce commenced in 1964 rather than 1976. This claim ignores the fact that both the Court of Appeals and the District Court accepted the finding of the West Virginia Supreme Court of Appeals that the Petitioner is a utility. That finding was not based solely on the nature of the system since 1964, but relates to the historical devotion of the gathering lines to public service "since 1935 and prior thereto." *Boggs v. Public Service Commission*, 154 W. Va. 146 at 155, 174 S.E.2d 331 at 337 (1970). Thus, the public utility obligation found by the Court preceded the sale in interstate commerce by almost thirty years.

Contrary to the argument of Petitioner, the decision of the Court below accurately reflects the facts of record.

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[10] As Respondent's Exhibit 9, appearing at JA-172-176 shows, West Virginia utilities which produced gas in 1979 included four of the State's largest distributors of gas to local customers: Cabot Corporation, Consolidated Gas Supply Corporation, Equitable Gas Company and Pennzoil Corporation. All four companies are regulated by both the Respondent in their intrastate operations and the FERC in their interstate operations.

CONCLUSION

There is no conflict among the circuits and the decision of the Fourth Circuit Court of Appeals is in harmony with the authority of this Court. Also, the facts of this case are unique to the Petitioner.

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT R. RODECKER

RICHARD E. HITT
Attorneys for Respondent,
Public Service Commission
of West Virginia

February 5, 1982

CERTIFICATE OF SERVICE

I, Robert R. Rodecker, counsel for the Respondent, do hereby certify that I have, on this 5th day of February, 1982, mailed a true and exact copy of the within Brief In Opposition and Appendix to Joseph R. Goodwin, Counsel for Harry C. Boggs, Goodwin & Goodwin, 1717 Charleston National Plaza, Charleston, West Virginia 25301.

Robert R. Rodecker

APPENDIX

APPENDIX

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MEMORANDUM OF THE FEDERAL ENERGY REGULATORY COMMISSION, AMICUS CURIAE, April 11, 1979 ---------- 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

Harry C. Boggs Plaintiff v. E. Dandridge McDonald *et al.* Defendants	Civil Action No. 79-2005-CH

MEMORANDUM OF THE FEDERAL ENERGY REGULATORY COMMISSION, AMICUS CURIAE

Harry C. Boggs, a West Virginia gas utility, filed this suit against the three members of the West Virginia Public Service Commission ("PSC") in this Court on January 9, 1979. Boggs claimed that the Court had jurisdiction under 15 U.S.C. §717(u) (1976) and the Commerce Clause of the U.S. Constitution. He sought equitable relief against the exercise of jurisdiction by the PSC over certain aspects of Boggs' operations. The Court granted a temporary restraining order, and on January 29, 1979, requested a memorandum from the Federal Energy Regulatory Commission concerning its jurisdiction in the matter. This memorandum responds to that request.

STATEMENT OF THE CASE

Boggs is a small producer of natural gas, with facilities located in Roane County, West Virginia. He has been in business since 1964, when he purchased an existing operation. As part of his purchase, Boggs agreed to continue supplying gas to local customers,[1] although he has since been selling most of his gas to an interstate pipeline. Contracts with that pipeline, Columbia Gas Transmission Company ("Columbia"), were approved by the Federal Power Commission[2] and Boggs is, therefore, subject to

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[1] The obligation Boggs assumed dates back to 1935.

[2] Under the Natural Gas Act, 15 U.S.C. §717 (1976), as interpreted by the U.S. Supreme Court in *Phillips Petroleum Company v. Wisconsin*, 347 U.S. 672 (1954), Boggs was subject to federal regulation on those contracts. Specificially, all gas sold in or set aside for ("dedicated" to) interstate commerce by producers, as well as interstate pipeline, was subject to Federal Power Commission certification requirements, rate regulation and abandonment procedures. For a discussion of dedication see *California v. Southland Royalty Co.*, 436 U.S. 519, 523-525, 527-528 (1978).

the jurisdiction of the Federal Energy Regulatory Commission (FERC), successor to the Federal Power Commission.[3]

Disputes have arisen over Boggs' local service obligations. In 1970, the West Virginia Supreme Court of Appeals ruled that under state law, Boggs was a utility. That meant he could not abandon his customers, who had been served by Boggs or his predecessor since 1935, without PSC approval. *Boggs v. PSC*, 174 S.E.2d 331 (W. Va. S.C. 1970). Boggs continued to resist the state, especially, when the PSC ordered him to serve new customers. The PSC responded by issuing a show cause order why Boggs should not be held in contempt. Boggs, to forestall the proceedings, came to this Court and claimed that the jurisdiction of the PSC over him conflicted with that of FERC.

ISSUE PRESENTED

In our view the issue presented here is whether Boggs' claims of conflict between FERC and PSC are premature.[4]

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[3] Under Section 401(a) of the Department of Energy Organization Act, 91 Stat. 589 (1977), to be codified as 42 U.S.C. §7101, *et seq.* FERC has succeeded to the functions of FPC with respect to the regulation of natural gas. Subsequently, Congress passed the Natural Gas Policy Act of 1978, 92 Stat. 3350 (1978) which establishes price ceilings for first sales of natural gas in both interstate and intrastate markets; gas previously dedicated to interstate commerce continues to be subject to the Natural Gas Act's non-price regulation.

[4] In this context we note that this memorandum does not discuss the extent of FERC jurisdiction over the gas produced in Boggs' wells, or preemption, or issues of abstention. *Cf. Central Power and Light Co., et al. v. PUC of Texas*, No. 78-2319 (5th Cir., March 28, 1979).

ARGUMENT

INTRODUCTION AND SUMMARY

The regulatory scheme for natural gas seeks to accomodate federal and state interests. Under Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b) (1976), federal regulation extends only to gas transported in interstate commerce, sold in interstate commerce for resale, and to natural gas companies engaged in these activities. The regulation of the local distribution of gas, or its sale in intrastate commerce is left to the states. States may control disposition of gas not dedicated to interstate commerce even if it comes from the same wells as dedicated gas. A State may not, however, divert gas from interstate commerce.

In the case at hand, it appears that Boggs' federal and state responsibilities exist in harmony. Although Boggs is subject to FERC jurisdiction regarding his contracts with Columbia, he is still under a duty imposed by the state to serve local customers. This he can do from undedicated gas in his wells, or, from gas purchased to satisfy the PSC order. The PSC has not ordered Boggs to divert interstate gas to local use. Accordingly, there appears to be no conflict between Boggs' federal and state obligations and this litigation is premature. We believe that the complaint should be dismissed.[a]

I. *Federal And State Regulation Coexist Under The Natural Gas Act And The Natural Gas Policy Act.*

In establishing federal control over gas dedicated to interstate commerce, Congress left room for traditional state public utility regulation. Specifically, Section 1(b) of the Natural Gas Act declared: "The provision [sic] of this Chapter shall apply to . . . the sale in interstate commerce of natural gas for resale . . . but shall not apply to . . . the local distribution of natural gas . . . ." 15 U.S.C. §717(b) (1976). In holding that the Natural Gas Act extends federal jurisdiction to gas which is commingled with interstate gas, courts have emphasized that purely local transportation and distribution remained under state supervision. As the court stated in *Louisiana Public Service Commission v. FPC*, 359 F.2d

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[a] If it were found that Boggs is diverting interstate gas to local use, FERC would proceed against him, either administratively or judicially.

525, 527 (5th Cir. 1966), "The question [of commingling] has no relation to . . . purely intrastate pipeline facilities which are completely separate from its interstate system . . . ." Similarly, in expanding federal jurisdiction over sales of natural gas, courts have recognized the statutory distinction between gas dedicated to interstate commerce, and intrastate gas. *See California v. Southland Royalty Co.*, 436 U.S. 519 (1978). Gas which has never been dedicated to interstate commerce is subject to state regulation, and purely local distribution obligations are beyond federal control.*

In addition to the careful allocation of federal and state functions in the Natural Gas Act, there is a limitation on state authority independent of the natural gas legislation inherent in the federal system. A state may not prohibit the sale in interstate commerce of gas which is not already under contract. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). Imposition of a continuing obligation to serve present and future distribution customers, however, is not such a prohibition. Rather, it is a direction to a local utility to satisfy its local public service obligations by whatever lawful means are available. Nothing in such a requirement implies diversion of gas previously dedicated to the interstate market. Rather, it requests the local gas utility to find other available supplies with which to meet its obligation.

II. *The Record In This Case Shows No Conflict Between FERC And The PSC Jurisdiction.*

In 1970, the West Virginia Supreme Court of Appeals affirmed a PSC order declaring Boggs to be a utility, under the obligation to serve customers in Roane County. *Boggs v. PSC*, *supra*. Paragraph VI of the complaint and the Columbia *amicus* brief at p. 10, indicate that the PSC ordered Boggs, as part of his duty as a public utility, to serve new customers. Boggs is claiming that this order is an unconstitutional burden on interstate commerce and a violation of the Natural Gas Act. FERC submits that these claims are premature.

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* The Natural Gas Policy Act of 1978, 92 Stat. 3350, brought intrastate gas under federal regulation for controls on maximum prices (Title I, Subtitle A) and allowed FERC to order intrastate pipelines to serve interstate customers (Section 311). However, states still regulate local utilities' service to local customers.

It is important to note that Boggs' basic obligation as a utility is compatible with his status as a small producer for interstate commerce. He need not, and apparently does not, serve his current Roane County customers with gas destined for Columbia. By the same token, he need not divert gas to his new customers. It may well be that there is enough undedicated gas to satisfy the PSC order. Even if there is not, Boggs may obtain other gas for his new local customers, while leaving uninterrupted the flow of gas to Columbia. In that connection, it should be noted the PSC simply ordered Boggs to serve Roane County customers. It did not direct him to divert gas from Columbia. Should such an order ever be entered — and we assume that it will never be — Boggs and FERC may pursue the remedies available to them. See *e.g. FPC v. Oklahoma Corporation Commission*, 362 F. Supp. 522 (D. Okla. 3-judge court) (1973), affirmed *per curiam*, 415 U.S. 961 (1974).

Because we see no conflict at this time between Boggs' status as a small producer regulated by FERC and a utility regulated by the PSC, we submit that the complaint should be dismissed, and plaintiff should be remitted to its remedies under state law for reviewing the PSC order. *See* 28 U.S.C. 1342 (1976)[7]; *Cf. Central Power & Light v. PUC of Texas*, No. 78-2319 (5th Cir., March 28, 1979).

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[7] 28 U.S.C. 1342 states:

The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or ratemaking body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and

(2) The order does not interfere with interstate commerce; and

(3) The order has been made after reasonable notice and hearing; and

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

CONCLUSION

For the reasons stated, this complaint is premature and should be dismissed.

Respectfully submitted

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Washington, D.C. 20426
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April 11, 1979

Boggs v. McDonald, et al.,
Civil Action No. 79-2005-CH

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing by mailing a copy to counsel listed below:

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